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In The

Supreme Court of the United States

JOHN A. HICKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit commit fundamental error when it issued a published opinion creating a conflict with D.C. Circuit precedent and contradicting this Court's ruling in *Zedner v. United States*, 547 U.S. 489 (2006) in the important area of the Speedy Trial Act (18 U.S.C. §§ 3161-3174)?

2. Did the Ninth Circuit commit fundamental error by its establishment of confusing, counter intuitive precedent regarding the definitional and procedural significance of what a "superseding indictment" is and when it held that, exclusively – "Notice to the defendant is the central policy underlying the statute of limitations"?

3. Whether the Ninth Circuit allowed a radical departure by the district court from the usual course of judicial proceedings in the important area of interlocutory appeal jurisdiction, which ordinarily vests exclusive jurisdiction in the appellate court, by allowing the district court to rule on the very issue then pending on appeal.

4. Whether the Ninth Circuit, relying on its internally-contradictory view of the elements of the crime at issue, improperly approve of a district court's exclusion of a defense expert's testimony, contrary to *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, JOHN A. HICKEY (MR. HICKEY), respectfully prays that this Court issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered on December 09, 2009 denying rehearing en banc of its earlier published opinion filed on September 02, 2009.

ORDER BELOW

On December 09, 2009 the Ninth Circuit Court of Appeals filed its Judgment, pursuant to Federal Rules of Appellate Procedure § 35, denying rehearing en banc of its earlier published opinion filed on September 02, 2009, affirming Hickey's convictions; the appellate court's published opinion, *United States v. Hickey*, 580 F.3d 922 (9th Cir. 2009) and later order denying rehearing en banc, are attached herein as APPENDIX 1-20 and 21, respectively.

JURISDICTION

On April 04, 2006 Mr. Hickey filed his notice of appeal with the Ninth Circuit, of the district court's convictions and sentence entered on March 16, 2006. On September 02, 2009 the Ninth Circuit Court of Appeals filed its published opinion affirming the

district court's convictions and sentence. APPENDIX 1. The Appellate Court had jurisdiction pursuant to Title 28 U.S.C. § 1291.

This Court has jurisdiction to review the appellate court's Judgment under 28 U.S.C. § 1254(1). Additionally, this writ is being timely filed under Title 28 U.S.C. § 2101(c) as judgment on Mr. Hickey's appeal was rendered on December 09, 2009.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . .

STATEMENT OF THE CASE

1. Facts Regarding Speedy Trial Act

The facts relative to the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, issue are straightforward. They are as follows:

On June 20, 2001 a hearing was held before the district court on Mr. Hickey's motion to dismiss for a violation of his speedy trial rights. The district court began the hearing by stating that if at any point in the proceedings in the previous years it had failed to make a proper specific and contemporaneous record for exclusion of time, she was then prepared to do so *retroactively*. [R.T. 6/20/01 at pgs. 3-5]. The court then made a blanket ruling that, *whether or not explicitly stated*, her prior exclusions always balanced the interests of allowing Mr. Hickey sufficient time to prepare – given the complexity of the matter – against the public and Mr. Hickey's interests in having a trial sooner. [R.T. 6/20/01 at pgs. 3-5]. Because it is important that the district court's specific reasoning be noted here, it is quoted despite it being of some length:

> This is a motion to dismiss based on a failure to comply with the Speedy Trial Act and I have appropriate problems in trying to determine exactly what happened at various times along the way, but to the extent that this Court, to wit, myself, at any point did not make a sufficient record either because I was expecting the Government to provide me with an order which they never did or because I simply fell down on the job myself, I would be prepared to make such a record . . .
>
> To the extent that there were any proceedings before myself, I would be prepared simply to state the following as to all of the challenged proceedings. This concern, this

> issue of discovery, it was no secret. There is no real high-level analysis here. It was that the defendant couldn't do discovery and since the defendant couldn't do discovery, the defendants couldn't be ready for trial within seventy days and therefore the case had to be continued to allow the defendant to do discovery unless the defendant expressed the view they did not want any discovery which was never the case . . .
>
> There was no real complexity to the Court's findings. However, I may not have stated on each occasion that I balanced the interest of the defendant and the public and articulated that specifically and I went through a mantra basically to that effect.

[R.T. 6/20/01 at pgs. 3-5].

However, at this time, the district court did not fully rule on the motion. Instead, the court conditioned her ruling on further necessary findings by the Magistrate Judge concerning a July 18, 1997 Order that Mr. Hickey alleged was also defective in tolling the speedy trial clock. The district court ruled that the Magistrate Judge should also be given the opportunity to *retroactively* amend his July 18, 1997 Order to make it comply with the Speedy Trial Act. [R.T. 6/20/01 at pgs. 20-21]. At the following hearing, the district court found that seventy-two days had elapsed, this did not comply with Hickey's constitutional rights under the Speedy Trial Act, because it was two days too many.

Following the lead of the district court, on August 14, 2001 the Magistrate Judge in turn amended his order to "reflect the state of mind of the court at the time of the original order" – four years earlier. Because of the Magistrate Judge's amended Order *retroactively* finding twenty-three days of excludable time, on September 12, 2001 the district court formally denied Hickey's Speedy Trial motion. [ER-390].

Hickey provided these very clear facts to the Ninth Circuit on the briefs and emphatically at oral argument. Despite this, the Ninth Circuit incorrectly quoted and gave itself the following foundation for denying this issue: "[S]imultaneous ['ends of justice'] findings [are] unnecessary so long as the trial court later shows that the delay was motivated by proper considerations." APPENDIX 6. Citing as its basis *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154 (9th Cir. 2000), quoting *United States v. Bryant*, 726 F.3d 510, 511 (9th Cir. 1984) [Alterations in the original]. This was self-evidently an *inconsistent* departure from this Court's ruling in *Zedner v. United States*, 547 U.S. 489 (2006) and the D.C. Circuit's *United States v. Sanders*, 485 F.3d 654 (D.C. Cir. 2007) which correctly interpreted *Zedner*.

2. Facts Regarding the Superseding Indictment Issue

On April 27, 2005 the Government filed a third superseding indictment against Mr. Hickey reviving two previously abandoned securities fraud violations

– counts 12 and 13 – which had been removed from the superseding and second superseding indictments. [ER-209]. On May 24, 2005 Mr. Hickey filed a motion to dismiss counts 12 and 13 of the third superseding indictment because they violated the statute of limitations. [ER-287]. Mr. Hickey argued that the securities fraud charges alleged in the original indictment had not remained "tolled" for the previous *eight years* before being resuscitated in 2005. [ER-287]. Mr. Hickey also argued that the Government's delay in bringing counts 12 and 13 of the third superseding indictment was prejudicial to Mr. Hickey because, for the previous four years since the securities fraud charges had been abandoned, Mr. Hickey focused on preparing a defense solely against the mail fraud charges – the only charges alleged in the superseding and second superseding indictments. [ER-287].

Most telling was that the Government did not resuscitate the securities fraud charges until five weeks before the deadline for submission of Mr. Hickey's expert reports and *less than three months from the date of trial*. [ER-287]. Thus if the securities fraud charges were not dismissed, Mr. Hickey would be forced to find additional expert witnesses and prepare a defense to these new, legally and procedurally different document-dependent charges, in an unreasonably short period of time. [ER-287]. Therefore, Mr. Hickey argued that to allow these time-barred charges, would violate his due process right to a fair trial. [ER-287].

On June 27, 2005 the district court denied Mr. Hickey's motion to dismiss. [ER-302]. The court concluded that the statute of limitations had been tolled on the securities fraud counts when the original indictment was returned on July 16, 1997, although the court gave no explanation as to how the securities fraud charges remained tolled for the additional four years that they were in limbo while the *superseding* and second *superseding* indictments were pending. [ER-302]. The district court also found that the Government's delay in resuscitating the securities fraud charges was not prejudicial to Mr. Hickey because, according to the district court, "defendant has the necessary discovery and does not need any additional experts to defend the securities counts, having already a large battery of experts." [ER-302].

However, the district court failed to elaborate on how Mr. Hickey's "large battery of experts" to defend against mail fraud charges equated to Mr. Hickey not needing any additional experts to defend against the legally quite different *securities fraud* charges or why it was not prejudicial for Mr. Hickey to have to prepare a separate defense against these new charges with less than three months to trial. [ER-302]. Trial began on September 26, 2005 only six months after Hickey's new counsel appeared on the case.

In its ruling on this statute of limitations issue, the appellate court made the following mistaken observation – "It follows from [9th Circuit precedent] that so long as the original indictment remains pending, a superseding indictment that omits the charge

contained in the first indictment does not stop the tolling of the statute of limitations as to that charge. The ***central question*** is whether Hickey was fairly on notice of the charges. . . . ***Notice to the defendant is the central policy underlying the statute of limitations.***" APPENDIX 10, 580 F.3d 929, emphasis added.

> The Ninth Circuit also held:
>
> Hickey's assertion that a superseding indictment that omits a charge against a defendant is essentially the same as dismissing that charge is inconsistent with criminal procedure. [Citation omitted] . . . Hickey's theory is premised on the view that the initial charges were no longer pending and had been "dropped" once they were omitted from the subsequent indictment.

The court then noted: "There is, however, no intermediate status ***in our case law*** between pending and dismissed. Either the charges remain pending or they have been dismissed, and the only way for the government to achieve dismissal is via leave of the court, which did not occur here." APPENDIX 11, 580 F.3d 929, emphasis added. Hickey's trial counsel failed to move for dismissal of the previous indictments.

Significantly, in a concurring opinion, one of the justices who joined the published opinion specifically noted – "I reluctantly concur in [the opinion]. I recognize that, under the precedent cited in the opinion, both in and out-of-circuit, 'superseding' has been given a meaning in the context of a criminal indictment that is the direct opposite of its meaning

in every other known context." This reluctantly concurring justice added – "If 'slight' may be equated with 'substantial' and 'another state' may include the 'same state,' [citation omitted], then we should not be surprised that a superseding indictment does not supersede anything at all. I do not favor depriving words of all meaning ***simply in order to reach a desired legal result***." This justice concluded with the intellectually-honest observation – "Here, I see no reason, rational or otherwise, to treat the word 'superseding' as meaning 'not replacing,' as we have done before and as we do again here. . . . We could start by using 'second indictment' or 'first additional indictment' to describe an indictment that follows the original indictment, but does not 'supersede' it. Were we to do so, we might earn more public trust and respect than we are accorded now." APPENDIX 19, 580 F.3d 933, emphasis added.

3. Facts Relative to the Interlocutory Jurisdictional Issue

In its published opinion, the Ninth Circuit characterizes this issue as follows – "We consider first whether the district court lost jurisdiction to proceed because of Hickey's two interlocutory appeals to this court related to double jeopardy." The lower court then amplified as follows – "Hickey asserts that his conviction must be reversed because the district court was without jurisdiction to conduct pretrial proceedings and trial." APPENDIX 3, 580 F.3d 922, 926. Then, the court notes:

> This argument stems from the general proposition that "[o]rdinarily, if a defendant's interlocutory claim is considered immediately appealable . . . , the district court loses its power to proceed from the time the defendant files its notice of appeal until the appeal is resolved." See United States v. Claiborne, 727 F.2d 842, 850 (9th Cir. 1984). A careful review of the chronology of events and the proceedings leads us to reject Hickey's jurisdictional argument.

APPENDIX 3, 580 F.3d 922, 926.

The context of this ruling is as follows.

On March 29, 2002 Mr. Hickey's counsel filed a notice of appeal challenging a ruling by the district court which denied Hickey's motion to dismiss the original and first superseding indictments because of a failure to allege probable cause. [SER-0221]. On April 5, 2002 Mr. Hickey's counsel also filed a notice of appeal challenging the district court's denial of his motion to dismiss the first superseding indictment for violation of the Fifth Amendment "double jeopardy" clause, and other rulings by the district court.

Significantly, at the March 26, 2002 hearing when the district court made the rulings spurring Mr. Hickey's interlocutory appeals, the district court expressly declined to find the issues Mr. Hickey intended to appeal as "frivolous," even though invited to do so by the government. Instead, the district court expressly held: ***"I will not make a finding that the motion was frivolous.*** Frankly, I agree with

[Hickey's counsel]. I do not want to spend an inordinate amount of time trying a case that the court of appeals thinks should never have been tried." [R.T. 3/26/02 at pg. 45, lines 4-7], emphasis added.

At a hearing on April 10, 2002 wherein the district court intended to rule on other pretrial motions, the court determined instead that absent a finding of "frivolousness" pending Mr. Hickey's interlocutory appeals, the district court was *divested of jurisdiction* to rule on motions or to move forward in the case. [SER-0223]. On May 8, 2002 the Ninth Circuit agreed with the district court's finding that Mr. Hickey's interlocutory appeal was not frivolous and denied the Government's motion to strike Hickey's appeals as such. [SER-0887]. Significantly, because Mr. Hickey's interlocutory appeals were pending, the district court had no status conferences from June 12, 2002 through March 16, 2004, almost two entire years.

On February 17, 2004 the case was reassigned to a different district court judge "to bring this particular case before a judge within the district with the most recent experience in similar cases against the same defendant involving overlapping facts and circumstances." [ER-275]. This district court judge had the "most recent experience" with Mr. Hickey's case because he had presided over the civil case against Mr. Hickey filed by the SEC.

On March 16, 2004 the district court ordered a status conference to determine the status of Mr.

Hickey's still pending interlocutory appeals. Despite the law of the case established earlier and the appellate court's finding that the district court was divested of jurisdiction to proceed with pretrial matters until resolution of the interlocutory appeals, the government requested reconsideration of those rulings. The district court ordered both parties to brief the issue once again. [ER-278; R.T. 3/16/04 at pg. 8].

At the next hearing, on April 6, 2004 the district court upheld the law of the case, ruling that the district court could not proceed with the case until Mr. Hickey's interlocutory appeals were exhausted. [ER-279; 4/6/04 Tr. at 3].

On May 10, 2004 Mr. Hickey's interlocutory appeals were decided. The mandate, however, did not spread until August 11, 2004. On October 18, 2004 the appellate court *recalled the mandate* on Mr. Hickey's interlocutory appeals and permitted him until December 15, 2004 to file a petition for rehearing en banc. At a hearing on October 26, 2004 counsel for Mr. Hickey advised the district court that the mandate had been recalled and argued that the recall of the mandate once again divested the court of jurisdiction to move forward with the case. [SER-0247].

Despite the earlier ruling by the original judge randomly assigned to the case two years earlier and the appellate court's denial of the government's motion to so find, on December 14, 2004 the district court did an about-face and *sua sponte* ruled Mr. Hickey's interlocutory appeals "frivolous" and enabled

himself to resume jurisdiction over all pre-trial matters which had been stayed since 2002. [ER-280]. Therefore, the court essentially resolved the interlocutory appeals still pending, the law-of-the-case and its own ruling of April 6, 2004, to grant himself jurisdiction and move the case forward to trial over objection by Mr. Hickey.

4. Facts Relative to Trial Issues

Ruling on whether the district court erred in excluding Hickey's expert witness's testimony on the reasons for the loss to the investors, the appellate court made the following remarkable observation:

> "The district court did not abuse its discretion in excluding this limited portion of [witness's] proferred expert testimony. See United States v. Prime, 431 F.3d 1147, 1152 (9th Cir.2005). To begin, ***loss to investors*** is not an element of either mail fraud or securities fraud, ***nor is an intent to cause loss***. See United States v. Utz, 886 F.2d 1148, 1151 (9th Cir.1989) (for mail fraud, "[i]t is enough . . . that the government charge and the jury find either that the victim was actually ***deprived of money or property*** or that the defendant ***intended to defraud the victim of same***."). United States v. Benny, 786 F.2d 1410, 1417 (9th Cir.1986) (actual loss is not an element of securities fraud)."

APPENDIX 13-14, 580 F.3d 922, 930-31, emphasis added.

That this is internally contradictory is self evident and is a key passage from the appellate court's published opinion now standing as precedent. The appellate court went on to conclude from this premise:

> Although Hickey is entitled to advance the claim that he did not intend to defraud the victims, his argument misunderstands the relevant intent – . . . if Hickey genuinely believed his investment scheme would be profitable and would result in gains for his investors, he would still be guilty of securities fraud and mail fraud if he knowingly lied to investors about the risks associated with his plan.

APPENDIX 14, 580 F.3d 931. But the record clearly shows that Hickey never argued that he in fact created an illicit "scheme" but that he expected his investors to suffer no loss, despite his illicit conduct. Hickey consistently argued his innocence. His expert testimony would have been that this was a bad business venture gone badly. The appellate court added to this issue by also permitting the giving of confusing jury instructions which mislead the jury and essentially directed a verdict on the issue of intent.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit committed fundamental error when it issued a published opinion creating a conflict with D.C. Circuit precedent and contradicting this Court's ruling in *Zedner v. United States*, 547 U.S. 489 (2006) in the important area of the Speedy Trial Act.

In *Zedner v. United States*, 547 U.S. 489, 506 (2006), this Court specifically noted of the Speedy Trial Act:

> While conceding that the District Court "never made an express finding on the record" about the ends of justice balance, Brief for United States 30, the Government argues that such an express finding ***did not need to be entered contemporaneously*** – and could be supplied on remand – because, given the circumstances in 1997, the ends of justice balance in fact supported the 1997 continuance. ***We reject this argument.*** In the first place, the Act requires ***express findings***, and in the second place, ***it does not permit those findings to be made on remand*** as the Government proposes.

Emphasis added. This Court added:

> The Act requires that when a district court grants an ends of justice continuance, it must "se[t] forth, in the record of the case, either orally or in writing, its reasons" for finding that the ends of justice are served and

> they outweigh other interests. 18 U.S.C. § 3161(h)(8)(A).

At page 507, footnote 7 of *Zedner*, this Court noted – "The best practice, of course, is for a district court to put its findings on the record at or near the time when it grants the continuance."

In *United States v. Sanders*, 485 F.3d 654, 659 (D.C. Cir. 2007), the D.C. Circuit held:

> Additionally, insofar as the district court made no mention of the countervailing interests, its August 5 statement fails to meet the Act's requirement of on-the-record findings that a continuance "out-weigh[ed] the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). After [*Zedner v. United States*, 547 U.S. 489, 506 (2006)], the ends of justice exception cannot support exclusion of the fifteen days from April 18 through May 2. Nor, as the government acknowledges, can this court engage in harmless error analysis, ***much less remand the case for the district court to engage in the proper balancing now***; the Act "does not permit those findings to be made on remand." [Citing *Zedner* at 505.]

Emphasis added. Also, in *United States v. Kelly*, 45 F.3d 45, 47 (2d Cir. 1995), the Second Circuit long ago and similarly held:

> Pursuant to section 3161(h)(8), "[a]ny period of delay resulting from a continuance granted . . . on the basis of [the court's] findings that

> the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial" is excludable from the 70-day period. In United States v. Tunnessen, 763 F.2d 74, 78 (2d Cir.1985), we held that time may not be excluded on the "ends of justice" rationale "unless the district court indicates at the time it grants the continuance that it is doing so upon a balancing of the factors specified by section 3161(h)(8)." ***We reasoned that an on-the-record contemporaneous finding*** ensures that "the required balancing was done at the outset," puts defense counsel on notice that the speedy trial clock has been stopped, and facilitates appellate review.

Emphasis added.

Here, the Ninth Circuit's interpretation of the Speedy Trial Act *post Zedner* was stated as follows: "[S]imultaneous ['ends of justice'] findings [are] ***unnecessary*** so long as the trial court ***later shows*** that the delay was motivated by proper considerations." APPENDIX 8, 580 U.S. at 928, emphasis added. This now binding legal precedent in the Ninth Circuit directly conflicts with this Court's holding in *Zedner*, with the D.C. Circuit's interpretation of this Court's ruling and with the Second Circuit's interpretation of this very issue in *Kelly*.

Therefore, review must be granted to resolve the conflict between the Ninth Circuit, on the one hand, and the D.C. and Second Circuits on the other, in

their interpretation of this Court's important Speedy Trial Act interpretation in *Zedner*.

2. The Ninth Circuit committed fundamental error by its establishment of confusing, counter intuitive precedent regarding the definitional and procedural significance of what a "superseding indictment" is and when it held that, exclusively – "Notice to the defendant is the central policy underlying the statute of limitations."

Review must be granted by this Court to clarify the definitional and procedural meaning of the phrase "Superseding Indictment" to provide guidance to lower courts. Here, the Ninth Circuit provided its interpretation of what a superseding indictment's meaning and procedural effect is to be, as follows:

> It follows from [Ninth Circuit precedent] that so long as the original indictment remains pending, a ***superseding indictment*** that omits the charge contained in the first indictment does not stop the tolling of the statute of limitations as to that charge. The ***central question*** is whether Hickey was fairly on notice of the charges. . . . ***Notice to the defendant is the central policy underlying the statute of limitations.***

APPENDIX 10, 580 F.3d 929, emphasis added. But notice to the defendant is not "the central policy underlying the statute of limitations."

In *United States v. Marion*, 404 U.S. 307, 322-23 (1971), this Court long ago clearly noted:

> As this Court observed in Toussie v. United States, 397 U.S. 112, 114-115, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970): "The purpose of a statute of limitations is to ***limit exposure to criminal prosecution*** to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed ***to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time*** and to minimize the danger of ***official punishment because of acts in the far-distant past***. Such a time limit may also have the salutary effect of ***encouraging law enforcement officials promptly to investigate suspected criminal activity***."

Emphasis added.

The Ninth Circuit explicitly relied on its own precedent in *United States v. Pacheco*, 912 F.2d 297, 305 (9th Cir. 1990) on this important issue. But there is a critical problem with this conclusion. *Pacheco* dealt only with an original indictment and a superseding indictment and held that the statute of limitations remained tolled "where the counts of an original indictment ***are simply duplicated verbatim*** into a superseding indictment." *Pacheco*, 912 F.2d at 305, emphasis added. The language in *Pacheco* upon which the Ninth Circuit relied provides – "If the allegations

and charges are ***substantially the same*** in the old and new indictments, the assumption is that the defendant has been placed on notice of the charges against him." Emphasis added. But this is explicitly *only* where the charges in both indictments are left "substantially the same."

The "allegations and charges" here were definitely not "substantially the same." Indeed, the district court noted – "the third superseding indictment ***added a new legal theory***." [CR-760; ER-229], emphasis added.

That a "superseding indictment" supersedes nothing, but instead, provides prosecutors virtually unfettered power to indict, supersede, and wait for years past the general five-year statute of limitations and then still have the power to revive superseded indictments, is power that cuts across the grain of democracies respectful of individual rights and due process.

That guidance from this Court is needed in this important area of criminal procedure can be readily determined from the sincere comments of a "reluctantly" concurring Ninth Circuit justice in this case – "I ***reluctantly*** concur in [the] opinion." Emphasis added. This reluctantly concurring Justice's observations about the plain meaning of the word "superseding" are compelling.

> I recognize that, under the precedent cited in the opinion, both in and out-of-circuit, "superseding" has been given a meaning in

> the context of a criminal indictment ***that is the direct opposite of its meaning in every other known context***. [Note omitted] This is, unfortunately, not the first occasion on which we have construed words in this manner. If "slight" may be equated with "substantial" and "another state" may include the "same state," [citation omitted], then we should not be surprised that a superseding indictment does not supersede anything at all. I do not favor depriving words of all meaning simply in order to reach a desired legal result.
>
> Here, I see no reason, rational or otherwise, to treat the word "superseding" as meaning "not replacing," as we have done before and as we do again here. . . . We could start by using "second indictment" or "first additional indictment" to describe an indictment that follows the original indictment, but does not "supersede" it. Were we to do so, we might earn more public trust and respect than we are accorded now.

APPENDIX 18-20, 580 F.3d 933, emphasis added. Indeed, Black's Law Dictionary's very definition of the word "supersede" is: "to obliterate, set aside, annul, replace, make void, inefficacious or useless, repeal." This is exactly what this "reluctantly" concurring Justice advocates in his concurring opinion, and in the context of the superseding indictment alleging a "new legal theory," undeniable.

3. The Ninth Circuit allowed a radical departure by the district court from the usual course of judicial proceedings in the important area of interlocutory appeal jurisdiction, which ordinarily vests exclusive jurisdiction in the appellate court, by allowing the district court to rule on the very issue then pending on appeal.

In *Abney v. United States*, 431 U.S. 651, 658-59 (1977) this Court held that a district court's denial of a motion to dismiss the indictment on double jeopardy grounds, as here, is a collateral order immediately appealable. The Ninth Circuit reaffirmed this principle in *United States v. Elliot*, 463 F.3d 858, 863 (9th Cir. 2006) wherein the court also cited to *United States v. Hickey*, 367 F.3d 888, 891 (9th Cir. 2004), Petitioner's very case dealing with the interlocutory appeals at bar.

In, *In the Matter of Thorp*, 655 F.2d 997, 998 (9th Cir. 1981), the Ninth Circuit made it very clear to its district courts that – "When a proper notice of appeal has been timely filed, the general rule is that jurisdiction over any matters involved in the appeal is immediately transferred from the district court to the court of appeals." The court went on to specifically note – "The district court is divested of authority to proceed further with respect for such matters, ***except in aid of the appeal, or to correct clerical mistakes, or in aid of execution of a judgment that has not been superseded***, until the mandate has been issued by the court of appeals." *Thorp* at 998.

Yet, the Ninth Circuit acted directly in contrast to its own announced precedent here and permitted the district court's ruling on the very issue then still pending on appeal – whether the interlocutory appeals were frivolous. Thus, this Court's supervisory powers must be invoked here to review this radical departure from the usual course of judicial proceedings in the important area of interlocutory appeal jurisdiction.

In *United States v. DeFries*, 129 F.3d 1293, 1302 (D.C. Cir. 1997) the D.C. Circuit enlightened this specific issue. There, the court noted:

> Because "jurisdiction is the power to act," it is essential that well-defined, predictable rules identify which court has that power at any given time. Kusay v. United States, 62 F.3d 192, 194 (7th Cir. 1995). The mandate rule prevents the waste of judicial resources that might result if a district court, prior to the issuance of the appeals court's mandate, proceeds with a case, ***ruling on motions*** and hearing evidence, after which the appeals court reverses its original decision on rehearing. ***That we ultimately sustained the district court's jurisdiction in this case is of no moment; district court jurisdiction cannot turn on retrospective examination of appeals court action. Where, as here, our mandate had not issued, the district court lacked jurisdiction to proceed with trial whether we later sustained its jurisdiction or not.*** Fully aware that our mandate had not issued, the district court chose to proceed with

> trial. If the Government wishes, the district court must now rehear the case . . . The convictions are reversed.

DeFries at 1303, emphasis added. It is precisely what the D.C. Circuit in *DeFries* forbade that the district court here was permitted to get away with by the appellate court, contrary to its own similar precedent.

4. The Ninth Circuit, relying on its internally-contradictory view of the elements of the crime at issue, improperly approved of a district court's exclusion of a defense expert's testimony, contrary to *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

The important nature of this error can best be focused by quoting the Ninth Circuit's facially-contradictory reasoning on the elements here necessary for conviction. In its published opinion, the lower court actually said:

> The district court did not abuse its discretion in excluding this limited portion of [expert's testimony, citation omitted]. To begin, ***loss to investors is not an element of either mail fraud or securities fraud, nor is an intent to cause loss***. [Citation omitted] . . . [F]or mail fraud, "[i]t is enough . . . that the government charge and the jury find either that the victim was actually ***deprived of money or property or that the defendant***

> ***intended to defraud the victim of same.***")
> [Citation omitted].

APPENDIX 13-14, 580 F.3d 930-31, emphasis added. Facially, this passage says on the one hand that "loss to investors is not an element of either mail fraud or securities fraud, nor is an intent to cause loss." On the other hand, it also states that it is enough for conviction that the "jury find either that the victim was actually ***deprived of money or property [loss] or that the defendant intended to defraud*** the victim of same." Emphasis added. In plain language, the Ninth Circuit essentially said that loss to investors or intent to cause loss, are not elements; but, nevertheless, the jury must find precisely one of these two to convict. This is the confusing guidance in the Ninth Circuit to all concerned with *mens rea* requirements for mail and securities fraud.

In *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978), this Court specifically noted of jury instructions there at issue:

> When viewed in terms of this standard, the jury instructions on the price-fixing charge cannot be sustained. "A conclusive presumption [of intent] which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense." [Citation omitted] The challenged jury instruction, as we read it, had precisely this effect; the jury was told that the requisite intent followed, as a matter of law, from a finding that the exchange of price information had an impact

> on prices. Although an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted, ***the jury must remain free to consider additional evidence before accepting or rejecting the inference***. Therefore, although it would be correct to instruct the jury that it may infer intent from an effect on prices, ultimately the decision on the issue of intent must be left to the trier of fact alone. The instruction given invaded this factfinding function.

Emphasis added. It was Hickey's excluded expert's testimony that would provide the essential "additional evidence" in this complicated investment venture case that would have helped the jury in its factfinding function. This is a bit like the confusion created by the phrase "superseding indictment" not meaning exactly what it should. To compound this already serious problem, the Ninth Circuit allowed the giving by the trial of highly-confusing jury instructions on the very issue of intent, by essentially directing the finding of *mens rea*.

This Court's guidance in this important recurring area of criminal law is sorely needed.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: March 9, 2010

580 F.3d 922

UNITED STATES of America, Plaintiff-Appellee,

v.

John A. HICKEY, Defendant-Appellant.

United States of America, Plaintiff-Appellee,

v.

John a. Hickey, Defendant-Appellant.

No. 05-10004.

No. 06-10206.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 13, 2009.

Filed September 2, 2009.

Ezekiel E. Cortez and Erin J. Lindquist, San Diego, CA, for the appellant.

Vijay Shanker, United States Department of Justice Criminal Division, Appellate Section, Washington, D.C., for the appellee.

Appeal from the United States District Court for the Northern District of California, William H. Alsup, District Judge, Presiding. D.C. No. CR-97-00218-WHA-02.

Before: STEPHEN REINHARDT, JOHN T. NOONAN and M. MARGARET McKEOWN, Circuit Judges.

Opinion by Judge MCKEOWN; Concurrence by Judge REINHARDT.

McKEOWN, Circuit Judge:

This appeal stems from a massive fraud scheme that resulted in protracted civil and criminal

proceedings spanning more than ten years. John A. Hickey ("Hickey") and his business partner, Mamie Tang ("Tang"), induced over 700 individuals to invest approximately $20 million in two real estate development funds. Their plan was to purchase land in Northern California, prepare the land for residential development, and then resell the properties to developers at a profit. As it turned out, however, the investors were duped by false representations regarding land title, guarantees, and securitization of the funds. Forensic accounting also showed that Hickey and Tang appropriated money from the funds for personal use.

As the investment scam progressed, it devolved into a Ponzi scheme. Hickey used the money from later investors to pay earlier investors the "interest" they were owed. When the money ran out and the fraud was exposed, the investors had lost approximately $18.5 million.

When the investment scheme fell apart in mid-1994, the Securities and Exchange Commission ("SEC") filed a civil enforcement action against Hickey, resulting in a consent decree that included a $1.1 million disgorgement payment. The investors also obtained an as-yet-unpaid $10 million civil judgment. Hickey was indicted in July 1997.

Hickey challenges his conviction for mail fraud and securities fraud on multiple grounds, including jurisdiction, statute of limitations, and claimed

evidentiary errors. He also appeals his 97-month sentence. We affirm his conviction and sentence.

ANALYSIS

I. JURISDICTION

We consider first whether the district court lost jurisdiction to proceed because of Hickey's two interlocutory appeals to this court related to double jeopardy. Hickey asserts that his conviction must be reversed because the district court was without jurisdiction to conduct pretrial proceedings and trial. This argument stems from the general proposition that "[o]rdinarily, if a defendant's interlocutory claim is considered immediately appealable . . . , the district court loses its power to proceed from the time the defendant files its notice of appeal until the appeal is resolved." *See United States v. Claiborne*, 727 F.2d 842, 850 (9th Cir. 1984). A careful review of the chronology of events and the proceedings leads us to reject Hickey's jurisdictional argument.

We turn to Hickey's first interlocutory appeal. Hickey filed a motion to dismiss on the ground that trying him criminally after the SEC civil enforcement action would amount to double jeopardy. Although the district judge originally assigned to the case, Judge Chesney, ruled in March 2002 that there was no double jeopardy problem with trying Hickey criminally, she declined to find that Hickey's double jeopardy claim was frivolous, which allowed Hickey to immediately appeal to this court. *See Abney v. United*

States, 431 U.S. 651, 659, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *United States v. Price,* 314 F.3d 417, 420 (9th Cir.2002). Judge Chesney took a practical view of the situation: "I will not make a finding that the motion is frivolous. . . . I do not want to spend an inordinate amount of time trying a case that the court of appeals thinks should never have been tried."

On April 30, 2004, we dismissed Hickey's appeal for lack of appellate jurisdiction because his double jeopardy claim was not colorable. *United States v. Hickey,* 367 F.3d 888, 892-93 (9th Cir.2004). Following issuance of the mandate on August 11, 2004, Hickey's attorney, who claimed medical incapacity during this period, filed a motion to recall the mandate in order to file a petition for rehearing. The mandate was recalled on October 18, 2004, but was reissued on May 27, 2005, when the petition for rehearing was denied.

Meanwhile, in February 2004, Judge Alsup took over the case and, in the fall of that year, Hickey obtained new counsel. On December 14, 2004, Judge Alsup found that Hickey's double jeopardy claim was frivolous and ruled that the district court retained jurisdiction to proceed despite the recall of the mandate. Hickey then filed his second interlocutory appeal, this time challenging the December 14, 2004 ruling. This second interlocutory appeal was consolidated with Hickey's post-conviction appeal and is now before us. Hickey argues that not only did the district court lack jurisdiction between the time the mandate was recalled and reissued – October 18, 2004-May 27,

2005 – but that it also lacked jurisdiction to try him because his second interlocutory appeal – challenging the December 14, 2004 jurisdictional ruling – was still pending during his trial. Although the district court heard some pretrial matters during the period between the mandate being recalled and then re-issued, the case did not proceed to trial until well after the mandate had been reissued.

As we noted in *Claiborne,* the notion that a pending appeal strips the trial court of jurisdiction is a judicially-crafted rule designed "to avoid confusion or waste of time resulting from having the same issues before two courts at the same time." 727 F.2d at 850. This protective approach is heightened in the case of a double jeopardy appeal in which the defendant is asserting a constitutional "right not to be tried." *See id.* Nonetheless, "[t]his concern is not as vitally involved when only pre-trial hearings proceed in the district court rather than the trial itself." *Id.* at 851.

The period relating to Hickey's first interlocutory appeal involved only pretrial matters and thus closely mirrors the scenario in *Claiborne,* in which the trial judge issued pre-trial rulings while an interlocutory appeal was pending. Although Hickey challenges the court's jurisdiction to continue with pretrial matters, he offers no specifics and claims no prejudice. The reality is that the district court in Hickey's case made no pathbreaking rulings during this period. A review of the trial court docket sheet reveals that most of October 2004-May 2005 was taken up with scheduling

and case management matters, counsel substitution and payment issues, and a plan for the identification of experts. Hickey contested none of these rulings when he proceeded to trial.

Like *Claiborne,* because Hickey's interlocutory appeal was ultimately a losing one, any claimed error in proceeding with limited pretrial matters was harmless and "no useful purpose would be served by requiring that court to redecide the pre-trial motions." *Id.* at 851. We decline to apply the divestiture rule in a slavish manner that ignores the reality of what happened in the trial court.

Although the error was harmless in this case, we want to impress upon district courts that acting before the mandate has issued or after the mandate has been recalled risks acting without jurisdiction and wasting judicial resources. *See United States v. DeFries,* 129 F.3d 1293, 1301-03 (D.C.Cir.1997) (invalidating a trial which "took several months, consuming thousands of hours of court and lawyer time" because the mandate had not issued before the trial began).

Hickey's effort to supplant the district court's jurisdiction through his second interlocutory appeal fares no better. The district court's December 14, 2004 ruling that it had jurisdiction to proceed with pretrial matters was not subject to interlocutory review and was not appealable until after Hickey's trial and conviction. *See United States v. Saccoccia,* 18 F.3d 795, 800-01 & n. 8 (9th Cir.1994) ("Courts have uniformly held that challenges to district court jurisdiction can

be fully vindicated on post-judgment appeal and are thus not subject to interlocutory appeal."). Filing an appeal from an unappealable decision does not divest the district court of decision. *Estate of Conners v. O'Connor,* 6 F.3d 656, 658 (9th Cir.1993). When the mandate reissued in Hickey's original interlocutory appeal on May 27, 2005, the district court once again had jurisdiction over the case and thus had authority to proceed with Hickey's trial.

II. SPEEDY TRIAL ACT

Hickey claims that his Speedy Trial Act rights were violated because the district court retroactively excluded time from the Speedy Trial Act "clock," resulting in his trial beginning after the 70-day limitation period. When Hickey was initially brought before a magistrate judge on July 17, 1997, the magistrate granted an "ends of justice" continuance under 18 U.S.C. § 3161(h)(7)(A), which excluded time from July 17, 1997, through August 12, 1997. Although the parties dispute whether there was a violation of the Speedy Trial Act, we do not need to figure out the timing details because Hickey acknowledges that there is no error if this stop clock period is credited.

The "ends of justice" exclusion of time under the Speedy Trial Act requires the court to "set[ ] forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by granting such continuance outweigh the best

interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). Among other factors, the court must consider "[w]hether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section." 18 U.S.C. § 3161(h)(7)(B)(ii). In the order excluding time, the magistrate stated that Hickey's "counsel cannot reasonably be expected to be ready for trial within the Speedy Trial Act's seventy day period" because the 77-page indictment charged Hickey with "massive fraudulent securities offerings and with misapplying and embezzling a substantial portion of the $20,000,000 raised in those offerings."

Despite these findings, Hickey argued to the district court that the magistrate judge had failed to properly justify the continuance. In response and out of caution, the district court asked the magistrate judge to clarify his earlier findings, which he did in detail, consistent with his initial ruling. Because the magistrate judge did, in fact, consider the statutory factors in granting an "ends of justice" exclusion, allowing the magistrate to clarify those findings was not in error: "'[S]imultaneous ['ends of justice'] findings [are] unnecessary so long as the trial court later shows that the delay was motivated by proper considerations.'" *United States v. Ramirez-Cortez,* 213 F.3d 1149, 1154 (9th Cir.2000) (quoting *United States*

v. Bryant, 726 F.2d 510, 511 (9th Cir.1984)) (alterations in original).

III. SUPERSEDING INDICTMENTS AND THE STATUTE OF LIMITATIONS[1]

Four indictments were filed against Hickey. Hickey was originally indicted on July 16, 1997, on mail fraud and securities fraud charges. Two superseding indictments were issued, but they both omitted the securities fraud charges. Hickey claims that these superseding indictments stopped the tolling of the statute of limitations as to those charges. Therefore, he argues, when the securities fraud charges were included in the third superseding indictment on April 27, 2005, the statute of limitations period should be measured from that date, and not from the date of the original indictment. We review *de novo* this question of law. *See Orr v. Bank of America, NT & SA,* 285 F.3d 764, 780 (9th Cir.2002).

The answer to Hickey's challenge is found in our precedent on tolling and indictments. It is well

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[1] In addition to the statute of limitations argument discussed below, Hickey also claims that none of the conduct that resulted in his conviction for securities fraud relating to Fund I occurred within the five year statutory period before July 16, 1997, rendering his conviction invalid. Hickey did not raise this argument during trial. The statute of limitations is an affirmative defense that is waived if it is not raised at trial, so Hickey forfeited this argument. *See United States v. LeMaux,* 994 F.2d 684, 689 (9th Cir. 1993).

accepted that an indictment tolls the statute of limitations as to all charges contained in the indictment. *United States v. Clawson,* 104 F.3d 250, 250-51 (9th Cir.1996). Significantly, "[a]n original indictment remains pending until it is dismissed. . . ." *United States v. Pacheco,* 912 F.2d 297, 305 (9th Cir.1990), and multiple indictments may simultaneously be pending against the same defendant in the same case, *United States v. Holm,* 550 F.2d 568, 569 (9th Cir.1977) (per curiam).

It follows from these cases that so long as the original indictment remains pending, a superseding indictment that omits a charge contained in the first indictment does not stop the tolling of the statute of limitations as to that charge. The central question is whether Hickey was fairly on notice of the charges. As we explained in *Pacheco,* 912 F.2d at 305 (quoting *United States v. Italiano,* 894 F.2d 1280, 1283 (11th Cir.1990)):

Notice to the defendant is the central policy underlying the statutes of limitation. If the allegations and charges are substantially the same in the old and new indictments, the assumption is that the defendant has been placed on notice of the charges against him. That is, he knows that he will be called to account for certain activities and should prepare a defense.

Apart from the fact that an indictment is pending until dismissed, here the intervening indictments contained the same factual allegations as the original

indictment. Although the third superseding indictment reincorporated securities fraud allegations, it did not broaden or substantially amend the original indictment. *Italiano*, 894 F.2d at 1282 ("A superseding indictment brought after the statute of limitations has expired is valid so long as the original indictment is still pending and was timely and the superseding indictment does not broaden or substantially amend the original charges.").

Hickey's assertion that a superseding indictment that omits a charge against a defendant is essentially the same as dismissing that charge is inconsistent with criminal procedure. Under Federal Rule of Criminal Procedure 48(a), "the government may, with leave of the court, dismiss an indictment. . . ." (emphasis added). The requirement that the government obtain leave of the court to dismiss would be superfluous if the government could, in effect, dismiss a charge by simply omitting it from a subsequent indictment. Hickey's theory is premised on the view that the initial charges were no longer pending and had been "dropped" once they were omitted from the subsequent indictment. There is, however, no intermediate status in our case law between pending and dismissed. Either the charges remain pending or they have been dismissed, and the only way for the government to achieve dismissal is via leave of the court, which did not occur here. Hickey was fairly on notice that he could be tried for any of the offenses contained in the third superseding indictment because all of the indictments remained pending until trial,

the factual predicate remained the same, and the charges were not substantially broadened.

Our conclusion is consistent with case law from our sister circuits holding that the government may elect to proceed on any pending indictment, whether it is the most recently returned superseding indictment or a prior indictment. *See, e.g.,* in addition to the Eleventh Circuit's opinion in *Italiano* cited above, *United States v. Walker,* 363 F.3d 711, 715 (8th Cir.2004) (both a superseding indictment and the original indictment remain pending and the government may go to trial on the original indictment); *United States v. Vavlitis,* 9 F.3d 206, 209 (1st Cir.1993) (an original indictment remains pending and can be used at trial even if a superseding indictment omits an element of a charged offense); *United States v. Bowen,* 946 F.2d 734, 736-37 (10th Cir.1991) (a superseding indictment does not invalidate a preceding indictment and the government may proceed to trial on any pending indictment); *United States v. Drasen,* 845 F.2d 731, 732 n. 2 (7th Cir.1988) ("It is well established that two indictments may be outstanding at the same time for the same offense if jeopardy has not attached to the first indictment. The government may then select the indictment under which to proceed at trial."); *United States v. Stricklin,* 591 F.2d 1112, 1116 n. 1 (5th Cir.1979) ("Since the original indictment apparently was never dismissed, there are technically two pending indictments against Stricklin, and it appears that the government may select one of them with which to proceed to trial.");

United States v. Cerilli, 558 F.2d 697, 700 n. 3 (3d Cir.1977) (both an original and superseding indictment may be pending at the same time and the government may choose which to proceed to trial under). Because all of the indictments against a defendant remain pending unless formally dismissed (at least until jeopardy attaches), the statute of limitations remains tolled for all of the charges in prior indictments, even if subsequent indictments omit those charges.

IV. TRIAL ISSUES

A. EXCLUSION OF EXPERT TESTIMONY

Hickey's expert witness, Stephen Roulac, testified at length about real estate finance – about the topic generally, market conditions, the reasonableness of Hickey's plan for the funds, whether the amount of money Hickey raised was reasonable given his stated plan, and whether the plan was likely to succeed. However, the district court barred him from testifying that he believed that if the SEC had not intervened, Hickey's investments would have been profitable and the investors would not have lost money. Hickey urges that this testimony would have established that he did not have an intent to defraud investors.

The district court did not abuse its discretion in excluding this limited portion of Roulac's proffered expert testimony. *See United States v. Prime,* 431 F.3d 1147, 1152 (9th Cir.2005). To begin, loss to investors

is not an element of either mail fraud or securities fraud, nor is an intent to cause loss. *See United States v. Utz,* 886 F.2d 1148, 1151 (9th Cir.1989) (for mail fraud, "[i]t is enough . . . that the government charge and the jury find either that the victim was actually deprived of money or property *or* that the defendant intended to defraud the victim of same.") (emphasis in original); *United States v. Benny,* 786 F.2d 1410, 1417 (9th Cir.1986) (actual loss is not an element of securities fraud). Although Hickey is entitled to advance the claim that he did not intend to defraud the victims, his argument misunderstands the relevant intent – "[w]hile an honest, good-faith belief in the truth of the misrepresentations may negate intent to defraud, a good-faith belief that the victim will be repaid and will sustain no loss is no defense at all." *Benny,* 786 F.2d at 1417. In other words, even if Hickey genuinely believed his investment scheme would be profitable and would result in gains for his investors, he would still be guilty of securities fraud and mail fraud if he knowingly lied to investors about the risks associated with his plan. Therefore, the testimony was properly excluded.

B. JURY INSTRUCTIONS

Hickey argues that the district court "impermissibly invaded the province of the jury" by giving instructions that allowed the jury to convict Hickey even if the prosecution did not prove *mens rea,* and that the court compounded this problem by refusing to give a good faith instruction.

Hickey takes three individual jury instructions out of context and insists that they misstate the law, ignoring our case law that "'[i]n reviewing jury instructions, the relevant inquiry is whether the instructions *as a whole* are misleading or inadequate to guide the jury's deliberation.'" *United States v. Garcia-Rivera,* 353 F.3d 788, 792 (9th Cir.2003) (quoting *United States v. Frega,* 179 F.3d 793, 806 n. 16 (9th Cir.1999)) (emphasis added). As Hickey concedes, trial counsel failed to object to these instructions, so we review for plain error. *See United States v. Recio,* 371 F.3d 1093, 1099-1100 (9th Cir.2004).

The district court gave a proper *mens rea* instruction and it was clear that, in order to convict, the jury was required to find that Hickey had the requisite intent. Nothing in the jury instructions Hickey finds objectionable negates the *mens rea* instruction. Those instructions simply stated the law and did not relieve the government of its burden.

Hickey's related argument that he was entitled to a separate "good faith" instruction, in addition to the district court's other instructions on specific intent, is foreclosed by Ninth Circuit precedent: "[o]ur case law is well settled that a criminal defendant has no right to any good faith instruction when the jury has been adequately instructed with regard to the intent required to be found guilty of the crime charged. . . ." *United States v. Shipsey,* 363 F.3d 962, 967 (9th Cir.2004) (internal citation and quotation marks omitted).

V. SENTENCING

Hickey offers four separate grounds to overturn his sentence, none of which we embrace. Hickey argues the district court improperly applied a presumption that a within-guidelines sentence was reasonable. *See Gall v. United States,* 552 U.S. 38, 128 S.Ct. 586, 596-97, 169 L.Ed.2d 445 (2007). While appellate courts may apply a presumption of reasonableness in reviewing a within-guidelines sentence, the Supreme Court has barred the district courts from applying such a presumption in determining a sentence in the first instance.[2] *Id.* However, nothing in the record supports the claim that the district court did, in fact, apply such a presumption.

Hickey argues that the district court impermissibly enhanced his sentence by fifteen levels based on the amount of the loss because the amount was not proven beyond a reasonable doubt to the jury. This argument fundamentally misunderstands the current state of constitutional law on sentencing. The relevant Sixth Amendment question is not, as Hickey claims, whether a judge found facts that were not proven beyond a reasonable doubt by the jury in the process of calculating the guidelines range. Rather, "the Sixth Amendment question . . . is whether the law *forbids* a judge to increase a defendant's sentence

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[2] This court, however, has declined to adopt a presumption of reasonableness for within-guidelines sentences on appellate review. *See United States v. Carty,* 520 F.3d 984, 994 (9th Cir. 2008) (en banc).

unless the judge finds facts that the jury did not find (and the offender did not concede)." *Rita v. United States,* 551 U.S. 338, 352, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). Because the sentencing guidelines are advisory after *Booker,* the Sixth Amendment does not require that the loss be proved to a jury beyond a reasonable doubt. *See United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

Hickey argues that his sentence will result in a significant overpayment to investors because the total amount of restitution he and Tang were ordered to pay exceeds the amount of loss by investors, less the disgorgement payment Hickey already made – $17,454,581. Tang was ordered to pay $12,266,090, and Hickey was ordered to pay $17,454,000. However, Tang and Hickey were ordered to pay joint and several restitution, a point that Hickey ignores in his brief, and hence there will be no windfall to investors.

The district court ordered Hickey to pay restitution of $5,000 per quarter while incarcerated and $500,000 per month upon release. Hickey did not object to the restitution schedule at trial, so we review district court's finding for plain error. *See United States v. Zink,* 107 F.3d 716, 718 (9th Cir.1997). Hickey's position is essentially that his own noncompliance with the presentencing procedure means that the district court committed plain error. Hickey failed to complete the financial information requested by the Probation Office so the court had limited information about his financial situation. See 18 U.S.C. § 3664(e) ("The burden of demonstrating financial

resources of the defendant ... shall be on the defendant."). Nonetheless, the district court was aware that Hickey had previously paid $1.1 million in the SEC enforcement action after insisting that he was unable to pay and that he was involved in a $1 billion real estate project in San Francisco. Hickey has not demonstrated that the district court committed plain error when it laid out the restitution schedule.

AFFIRMED.

REINHARDT, Circuit Judge, specially concurring:

I reluctantly concur in Judge McKeown's opinion. I recognize that, under the precedent cited in the opinion, both in and out-of-circuit, "superseding" has been given a meaning in the context of a criminal indictment that is the direct opposite of its meaning in every other known context.[1] This is, unfortunately, not the first occasion on which we have construed words in this manner. If "slight" may be equated with "substantial" and "another state" may include the "same state," *see United States v. Saavedra-Velazquez*, No. 08-10078, 578 F.3d 1103, 1110-11 (9th Cir. Aug. 21, 2009) (Reinhardt, J., specially concurring), then we should not be surprised that a superseding

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[1] *See, e.g.*, Random House Dictionary of the English Language 1428 (1979) (defining "supersede" as "to replace ... set aside ... [or] supplant").

indictment does not supersede anything at all. I do not favor depriving words of all meaning simply in order to reach a desired legal result. Here, I see no reason, rational or otherwise, to treat the word "superseding" as meaning "not replacing," as we have done before and as we do again here. An abundance of judicial creativity has been devoted to tasks like interpreting "another" to mean "the same";[2] "slight" to mean "substantial";[3] and "superseding" to mean "not superseding."[4] I propose redirecting that creativity to better uses, such as finding terms that actually mean what they appear to mean. We could start by using "second indictment" or "first additional indictment" to describe an indictment that follows the original

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[2] *See Alden v. Maine,* 527 U.S. 706, 723-24, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (reaffirming the holding of *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), that the Eleventh Amendment prohibition of suits "against one of the United States by Citizens of another State" applies to suits brought against a state by a citizen of the same state).

[3] *See United States v. Sarbia,* 367 F.3d 1079, 1086 (9th Cir.2004) (holding that "the terms 'some act' or 'slight act,' as used in the Nevada caselaw, have the same operational meaning as 'substantial step,' as used in the traditional common-law definition of attempt"); *see also United States v. Saavedra-Velazquez,* No. 08-10078, 578 F.3d 1103 (9th Cir. Aug. 21, 2009) (applying *Sarbia* to California's definition of attempt); *cf. United States v. Rivera-Ramos,* No. 08-10174, 578 F.3d 1111 (9th Cir. Aug. 21, 2009) (adopting the Second Circuit's conclusion that "[t]he difference between the federal law's requirement of a 'substantial step' and the New York law's requirement of 'dangerous proximity' is . . . 'more semantic than real' ") (quoting *United States v. Fernandez-Antonia,* 278 F.3d 150, 162-63 (2d Cir.2002)).

[4] *See* Opinion at 929-30 (collecting cases).

indictment, but does not "supersede" it. Were we to do so, we might earn more public trust and respect than we are accorded now. Any additional amount, no matter how slight, i.e. substantial, would be most welcome.[5]

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[5] Other ways, of course, would be to describe our function more honestly than representing that we simply apply law to facts and nothing more, and by acknowledging frankly that empathy is truly an essential quality for a jurist.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN A. HICKEY, Defendant-Appellant.	No. 05-10004 No. 06-10206 D.C. No. 97-CR-00218-WHA-2 Northern District of California, San Francisco ORDER (Filed Dec. 9, 2009)

Before: REINHARDT, NOONAN, and McKEOWN, Circuit Judges.

Judges Reinhardt and McKeown vote to deny the petition for rehearing en banc and Judge Noonan so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, filed September 15, 2009, is DENIED.